

1 CHRISTOPHER M. McDERMOTT (SBN 253411)
2 cmcdermott@piteduncan.com
3 TODD S. GARAN (CA SBN 236878)
4 tgaran@piteduncan.com
5 GREGORY P. CAMPBELL (CA SBN 281732)
6 gcampbell@piteduncan.com
7 PITE DUNCAN, LLP
8 4375 Jutland Dr., Ste. 200
P.O. Box 19734
San Diego, CA 92177-9734
Telephone: (858) 750-7600
Facsimile: (619) 590-1385

8 Attorneys for JPMorgan Chase Bank, N.A. and CitiMortgage, Inc.

9
10 **UNITED STATES BANKRUPTCY COURT**

11 **EASTERN DISTRICT OF CALIFORNIA – SACRAMENTO DIVISION**

12 In re

Case No. 13-23040

13 HERBERT EDWARD MILLER,

D.C. No. PD-2

14 Debtor.

Chapter 11

15
16
17
18 **MOTION TO DISMISS DEBTOR'S
CHAPTER 11 BANKRUPTCY CASE
OR, IN THE ALTERNATIVE, TO
CONVERT DEBTOR'S CASE TO ONE
UNDER CHAPTER 7 OF THE
BANKRUPTCY CODE**

19 **Hearing:**

20 Date: November 12, 2013
21 Time: 9:32 a.m.
22 Place: 501 I Street, 6th Floor, Ctrm
32, Sacramento, CA

23
24 JPMorgan Chase Bank, N.A. ("Chase") and CitiMortgage, Inc. ("Citi") (collectively the
25 "Creditors"), secured creditors of the above-entitled Debtor, Herbert Edward Miller ("Debtor"),
26 hereby submit the following Motion to Dismiss Debtor's Chapter 11 Bankruptcy Case or, in the
27 Alternative, to Convert Debtor's Case to one Under Chapter 7 of the Bankruptcy Code ("Motion to
28 Dismiss"). This Motion to Dismiss is based on "cause" under 11 U.S.C. § 1112(b)(4) including: (1)

1 the substantial or continuing loss to or diminution of the estate and the absence of a reasonable
2 likelihood of rehabilitation; (2) failure to file a disclosure statement or, to file or confirm a plan
3 within a time fixed by the court or within a reasonable period of time; (3) failure to comply with an
4 order of the court; (4) unauthorized use of cash collateral; and (5) the best interests of creditors.

5 1. Cause exists to dismiss or convert the case under 11 U.S.C. § 1112(b)(4)(A) due to
6 the substantial or continuing loss to the diminution of the estate as demonstrated by the Debtor's
7 monthly operating reports and the absence of a reasonable likelihood as demonstrated by the estate's
8 negative cash flow. Further, the Debtor's post-petition liabilities have increased as claims continue
9 to accrue interest and attorneys' fees;

10 2. Cause exists to dismiss or convert the case under 11 U.S.C. § 1112(b)(4)(A) and (J)
11 due the Debtor's failure to file a Disclosure Statement and/or confirm a Chapter 11 Plan despite
12 filing for Chapter 11 bankruptcy protection over seven months ago. It appears the Debtor's rental
13 properties fail to generate positive cash flow and contain no equity for the benefit of the estate.
14 Additionally, it appears any proposed Chapter 11 Plan will lack feasibility based on the Debtor's
15 current income and 1111(b) elections filed by Creditors. Accordingly, there is an absence of a
16 likelihood of rehabilitation;

17 3. Cause exists to dismiss or convert the case under 11 U.S.C. § 1112(b)(4)(E) due to the
18 Debtor's failure to comply with a court order instructing the Debtor to file a Plan and Disclosure
19 Statement no later than August 16, 2013. (*See* Docket No. 90, Exhibit F);

20 4. Cause exists to dismiss or convert the case under 11 U.S.C. § 1112(b)(4)(D) as Debtor
21 is using cash collateral in the form of rental income without prior court authorization; and

22 5. Finally, dismissal is in the best interests of creditors as estate produces negative cash
23 flow and contains no assets for the benefit of unsecured creditors.

24 The Motion to Dismiss is supported by the Memorandum of Points & Authorities, the
25 Exhibits, Bankruptcy Schedules, Statement of Financial Affairs, monthly operating reports, financial
26 documents, and such other and further evidence and oral argument as may be presented to the Court
27 at or before the time of the hearing.

28 /././

WHEREFORE, Creditors respectfully request:

1. That the Court grant this motion and dismiss Debtor's case;
 2. Alternatively, that the Court convert this case to a chapter 7; and
 3. Such other relief as the Court deems just and proper.

PITE DUNCAN, LLP

Dated: October 8, 2013

/s/ Gregory P. Campbell

GREGORY P. CAMPBELL

Attorneys for Creditors JPMorgan Chase Bank, N.A.
and CitiMortgage, Inc.